United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Colu

JANUARY TERM, 1901.

No. 1065.

KUNIGUNDA FEDARWISCH, APPELLANT

vs.

THADDEUS ALSOP.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF C

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1901.

No. 1065.

KUNIGUNDA FEDARWISCH, APPELLANT,

vs.

THADDEUS ALSOP.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 7, 1901.

In the Court of Appeals of the District of Columbia.

KUNIGUNDA FEDARWISCH, Appellant,
vs.
THADDEUS ALSOP. } No. 1065.

a Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } No. 18210. In Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill to Enforce Set-off or Counter-claim.*

Filed April 9, 1897.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } In Equity. No. 18210, Docket No. 42.

The bill of complaint of Kunigunda Fedarwisch against Thaddeus Alsop in chancery exhibited:

1. That she is a citizen of the United States of America, a resident of the District of Columbia, and sues in her own right.

2. That the defendant is also a citizen of the United States of America, a resident of the District of Columbia, and is sucd in his own right.

3. That heretofore, to wit, on April 9, A. D. 1897, the defendant recovered a judgment in law cause No. 40238, in this court, against your complainant for one hundred and fifty dollars ($150.00) as damages for an alleged assault and battery committed upon him, and for costs of his suit. Said law cause reached this court by appeal from the judgment of a justice of the peace, and there is therefore no appeal to your complainant from the said judgment of this court. Said cause was tried in this court against your complainant and Lewis Fedarwisch and Victor Frank as joint defend-

ants, but judgment passed against your complainant alone, and for her said codefendants without costs to them. The record and proceedings in said law cause No. 40238 are hereby referred to
2 and made part of this bill of complaint.

4. That your complainant is entirely solvent, being the absolute owner in her own right of real and personal property subject to execution at law, situate in the District of Columbia, wholly free from encumbrances, of the value of, to wit, twenty-five thousand dollars ($25,000.00), and the defendant is about to enforce the satisfaction of his said judgment from the property of your complainant.

5. That your complainant is sixty years of age, and earns her living by raising and selling garden truck, and the defendant is a son-in-law of your complainant.

6. That before said suit was instituted and at the time of the rendition of the said judgment against your complainant the defendant was and still is indebted unto your complainant for house rent, money loaned to him, merchandise furnished to him, and money paid for him by your complainant in the full sum of three hundred and sixty-six and $\frac{57}{100}$ dollars ($366.57), for which amount, with interest, your complainant, with her husband, Lewis Fedarwisch, as a nominal party plaintiff with her, instituted a suit against the defendant in this court on March 31, A. D. 1897, in law cause No. 40895, which suit is still pending. The record and proceedings in this law cause are also hereby referred to and made part of this bill of complaint.

7. That by reason of the premises your complainant cannot set-off or counter-claim at law her said claim against the defendant against his said judgment against your complainant.

3 8. That the defendant is utterly insolvent, not having, either in personal property or wages, even one-tenth of the amount exempt to him by law, and being entitled to exemptions by reason of his being a married man, a householder, and the head of a family, and that the defendant has no real property whatever, and your complainant cannot, therefore, by reason of his insolvency, enforce the satisfaction and payment of the whole or any part of her said claim against him at law, and cannot for the same reason enforce the satisfaction or payment of any part thereof against him in equity without the aid of this court to compel a set-off or counter-claim in her favor to the whole extent of his said judgment against her, and that if your complainant be compelled to pay the said judgment of the defendant against her she will wholly lose her said debt due, as aforesaid, from him.

9. That by reason of the premises, and particularly the insolvency of the defendant, your complainant is entitled in equity to have the defendant's said judgment against her applied, so far as the same extends, to the satisfaction and payment, *pro tanto*, of her said claim against him, and to have him enjoined from executing his said judgment, and thus to enforce as a set-off or counter-claim in her favor her said claim against him to the extent sufficient to wholly liquidate, satisfy, and pay his said judgment, and to compel the de-

fendant to enter on record his said judgment as satisfied and paid in full.

The premises considered, your complainant respectfully prays as follows:

1. That process may issue requiring the defendant to appear and answer the exigencies of this bill of complaint.

4 2. That your complainant's said claim against the defendant may be decreed to be a set-off or counter-claim against the defendant's said judgment.

3. That the defendant's said judgment may be decreed to be satisfied and paid in full in the manner aforesaid, and that he may be compelled to duly enter the same on record as satisfied and paid in full.

4. That the defendant may be enjoined from executing his said judgment.

5. That all proper accounts may be taken and stated in the premises.

6. That a decree may be passed against the defendant for the recovery by your complainant of the excess of your complainant's said debt over the defendant's said judgment.

7. That your complainant may have such other and further relief in the premises as to the court may appear proper and just.

And, as in duty bound, your complainant will ever pray, etc.

The defendant to this bill of complaint is Thaddeus Alsop.

KUNIGUNDA FEDARWISCH.

THOMAS M. FIELDS,
Solicitor for Complainant.

Kunigunda Fedarwisch, being first duly sworn, deposes
5 and says that she is the complainant named in the foregoing bill of complaint by her subscribed; that she has heard the same read and knows the contents thereof; that the matters and things therein set forth upon personal knowledge are true, and those therein set forth upon information and belief she believes to be true.

KUNIGUNDA FEDARWISCH.

Subscribed and sworn to before me this ninth day of April, A. D. 1897.

J. R. YOUNG, *Clerk, &c.*,
By R. J. MEIGS, JR., *Ass't Cl'k.*

THOMAS M. FIELDS,
Solicitor for Complainant.

Restraining Order.

Filed April 9, 1897.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } Equity. No. 18210, Docket, 42.

Upon consideration of the bill of complaint in this cause filed, and upon motion of the complainant, by Mr. Thomas M. Fields, her solicitor, it is, this ninth day of April, A. D. 1897, ordered that the defendant, Thaddeus Alsop, be, and he is hereby, enjoined from enforcing his judgment against the complainant herein which he recovered on April 9, A. D. 1897, in this court in law cause No. 40238, until the further order of this court.

By the court:

W. S. COX, *J.*

6 *Marshal's Return.*

Served copy of within order on within-named defendant April 9, 1897.

ALBERT A. WILSON, *Marshal.*

Memorandum.

April 20, 1897.—Answer of defendant to bill filed.

Order Modifying Restraining Order, &c.

Filed June 16, 1897.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } In Equity. No. 18210.

Upon consideration of the intervening petition of Obear & Douglass to modify the restraining order heretofore granted so as to direct the payment to them of the sum of ninety-five dollars ($95.00) out of the amount of the judgment of the respondent against the complainant recovered in law cause No. 40238 in this court, it is, this 16th day of June, 1897, ordered that the said intervenors, Obear and Douglass, have a first claim to and lien upon the judg-
7 ment recovered at law in said cause No. 40238, entitled Thaddeus Alsop *vs.* Kunigunda Fedarwisch *et al.*, for their fees earned in said cause, to the extent and for the sum of seventy-five ($75.00) dollars, and also to the attorney's docket fee of twenty ($20.00) dollars, taxed as part of the costs in said law cause.

It is further ordered that the complainant do pay out of the amount of the said judgment against her in said law cause to the said Obear & Douglass the sum of seventy-five ($75.00) dollars as their fee and compensation due them for their aforesaid services, and the further sum of twenty ($20.00) dollars, docket fee taxed in the said cause, and such payment, when made, shall be duly credited of record in this and said law cause; and if the said sum of ninety-five ($95.00) dollars be not paid within ten days from the date of this order, the restraining order heretofore granted in this cause shall be dissolved.

It is further ordered that in so far as the order of 4th day of May, 1897, requires the complainant to pay the amount of said judgment in said law cause into the registry of this court, it is hereby vacated.

By the court:

W. S. COX, *J.*

8 *Order for Satisfaction, &c.*

Filed June 19, 1897.

In the Supreme Court of the District of Columbia, the 18th Day of June, 1897.

KUNIGUNDA FEDARWISCH *vs.* THADDEUS ALSOP. } Equity. No. 18210, Docket No. 42.

The clerk of said court will enter the order herein of June 16, 1897, satisfied so far as it directs the payment of ninety-five dollars ($95.00) to us by the complainant.

OBEAR & DOUGLASS,
Solicitors for Def't Alsop and for Selves.

Replication.

Filed June 4, 1897.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH *vs.* THADDEUS ALSOP. } Eq. 18210.

The complainant joins issue on the answer of the respondent.

THOMAS M. FIELDS,
Solicitor for Complainant.

9 *Stipulation between Counsel to Allow Defendant to Withdraw, &c.*

Filed November 2, 1900.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

KUNIGUNDA FEDARWISCH, Complainant,
vs.
THADDEUS ALSOP, Defendant.
} In Equity. No. 18210.

It is hereby stipulated by and between Thomas M. Fields, Esq., att'y for complainant, and Douglass & Douglass and Levi H. David, attorneys for defendant, as follows:

1. That the defendant shall have the right, and hereby agrees, to withdraw his answer heretofore filed in this cause and in lieu thereof to interpose a general demurrer to the bill of complaint herein, so that the questions of law involved in this proceeding may be determined by the court.

2. That the demurrer to be interposed by the defendant as aforesaid shall be heard and determined by the court upon the bill of complaint herein, and the admission by the complainant that the law cause No. 40895 therein referred to was dismissed on February 3d, 1900, by the clerk of the supreme court of the District of Columbia, under the stet rules of said court, for want of prosecution, it being hereby stipulated that the proceedings in said cause may
10 be considered by the court at the hearing of said demurrer.

3. It is hereby understood and stipulated that if by the decree of the court upon the issues raised by demurrer to be interposed by defendant, as aforesaid, the demurrer shall be overruled, then the complainant shall have final decree as prayed, but if the demurrer shall be sustained and the bill of complaint dismissed the defendant shall have final decree in his favor.

THOMAS M. FIELDS,
Attorney for Complainant.
DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorney for Defendant.

Washington, D. C., October 31, 1900.

Demurrer.

Filed November 20, 1900.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH, Complainant,
vs.
THADDEUS ALSOP, Defendant.
} In Equity. No. 18210.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint

contained to be true in manner and form as the same are thereby set forth, doth demur thereto and for cause shows:

11 1. That the said complainant has not in and by her said bill stated such a case as doth or ought to entitle her to any such relief as is thereby sought and prayed for from or against this defendant.

2. That the said complainant, as shown by her said bill of complaint, has a plain, adequate, and complete remedy at law.

3. That it does not appear by said bill that the complainant has reduced her suit, known as law cause No. 40895, to judgment.

4. Wherefore, and for divers other errors and imperfections, this defendant demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

his
THADDEUS x ALSOP, *Defendant.*
mark.

DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

I, Thaddeus Alsop, being duly sworn, say that I am the defendant in the above-entitled cause, and that the foregoing demurrer is not interposed for delay.

his
THADDEUS x ALSOP.
mark.

Sworn to and subscribed before me this the 20th day of November, 1900.

JOHN A. SWEENEY,
[SEAL.] *Notary Public, D. C.*

12 We hereby certify that in our opinion the foregoing demurrer is well founded in law.

DOUGLASS & DOUGLASS,
LEVI H. DAVIS,
Attorneys for Defendant.

Decree, &c.

Filed December 24, 1900.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } No. 18210. Equity.

This cause came on for hearing upon the bill, demurrer, and stipulation of counsel and was argued by the respective counsel, and all and singular the proceedings were by the court read and considered.

It is thereupon, this 24th day of December, 1900, by the court and the authority thereof adjudged, ordered, and decreed that the said demurrer be, and the same is hereby, sustained, (and, in accordance with the agreement set forth in the said stipulation,) the said bill be, and the same is hereby, dismissed, with costs.

A. B. HAGNER,
Asso. Justice.

Memorandum.

January 18, 1901.—Appeal by complainant.

13 In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } No. 18210. In Equity.

The President of the United States to Thaddeus Alsop, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 18th day of January, 1901, wherein Kunigunda Fedarwisch is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 18th day of January, in the year of our Lord one thousand nine hundred and one.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 21st day of January, 1901.

LEVI H. DAVID,
Attorney for Appellee.

14 *Memorandum.*

January 18, 1901.—Appeal bond filed.

Order for Transcript of Record.

Filed February 6, 1901.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH
vs.
THADDEUS ALSOP. } Equity. 18210.

The clerk will please prepare the transcript of record on appeal in this suit and include the following:

1. Original bill.
2. Injunction order of April 9, 1897, and return of marshal thereto.
3.
4. Memorandum of filing of answer to bill on merits.
5.
6. Order directing complainant to pay respondent solicitors $95.00, as prayed.
7. Order of satisfaction.
8. Replication.
9. Stipulation of counsel.
10. Demurrer.
11. Decree sustaining demurrer and dismissing bill.
12. Memorandum of noting of appeal and order for citation.
13.
14. Memorandum of approval and filing of appeal bond.
15. This præcipe.

THOMAS M. FIELDS,
Solicitor for Complainant.

Service of copy of above præcipe acknowledged this 4th day of February, A. D. 1901.

LEVI H. DAVID,
Solicitor for Respondent.

16 *Stipulation of Counsel, &c.*

Filed February 14, 1901.

In the Supreme Court of the District of Columbia.

KUNIGUNDA FEDARWISCH, Complainant,
vs.
THADDEUS ALSOP, Defendant. } In Equity. No. 18210.

It is hereby stipulated by and between counsel for the respective parties that the following correctly sets forth certain material proceedings in law cause No. 40895 of the supreme court of the District of Columbia, wherein Kunigunda Fedarwisch and Lewis Fedarwisch

are plaintiffs and Thaddeus Alsop is defendant, and this stipulation shall be filed in the above-entitled cause, and shall constitute a part of the record on appeal of said cause to the Court of Appeals of the said District.

That on March 31, 1897, plaintiffs filed their declaration, which contained three several counts, claiming the sum of $366.57; that in the first count thereof plaintiff Kunigunda Fedarwisch alleged that defendant was indebted to her in the sum of $155 for house rent from April 3, 1895, to July 20, 1896; that in the second count plaintiff alleged that defendant "on divers days in the month of October, 1893, and on divers other days, at short intervals apart, between October, 1893, and the latter part of May, 1894, became and was indebted to said plaintiffs for that the plaintiff Kunigunda Fedarwisch, at the several times aforesaid, advanced, lent, and paid out to and for said Thaddeus Alsop, at his special instance and request, divers sums of money, * * * to wit, $211.57"; that the
17 third count consisted of the money counts combined; particulars of demand were duly attached.

That on April 19, 1897, defendant filed twelve pleas, pleading the general issue and the statute of limitations to the second count.

That on April 27, 1897, plaintiffs joined issue*d* on the plea of the general issue, and replied new promise within three years prior to the institution of action to the plea of the statute of limitations; that on May 1, 1897, defendant joined issue on plaintiffs' replication.

That on May 4, 1897, said cause was regularly calendared for trial, and on December 21, 1898, the cause was "stetted" under the rules of the court.

That the following entry appears in Minute Book No. 40, at page 235:

"January Term, 1900.

FEBRUARY 3.

KUNIGUNDA FEDARWISCH, LEWIS FEDARWISCH, Plaintiffs,
vs.
THADDEUS ALSOP, Defendant. } At Law. No. 40895.

"This cause having remained upon the stet calendar for more than three terms, upon motion of Douglass & Douglass, the same is ordered dismissed. Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day and recover against the plaintiffs his costs of defense, to be taxed by the clerk, and have execution thereof."

That in docket No. 45, in the above-entitled cause, the following entry is contained:

1900, Febr'y 3.—Suit dismissed at plaintiffs' costs, under
18 stet rule (M. 40, p. 235).

It is further stipulated that the foregoing dismissal of the said cause *was* ordered by the court and the entry by the clerk in the

docket as aforesaid were made without notice to the plaintiffs or their counsel.

THOMAS M. FIELDS,
Solicitor for Kunigunda Fedarwisch.
DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Solicitors for Thaddeus Alsop.

Washington, D. C., February 14, 1901.

19 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 18, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 18210, equity, wherein Kunigunda Fedarwisch is complainant and Thaddeus Alsop is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 19th day of February, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1065. Kunigunda Fedarwisch, appellant, *vs.* Thaddeus Alsop. Court of Appeals, District of Columbia. Filed Feb. 25, 1901. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1901.

No. 1065.

KUNIGUNDA FEDARWISCH, APPELLANT,

vs.

THADDEUS ALSOP, APPELLEE.

BRIEF FOR APPELLEE.

CHAS. A. DOUGLASS,
E. S. DOUGLASS,
LEVI H. DAVID,
Attorneys for Appellee.

LAW REPORTER PRINT.

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1901.

No. 1065.

KUNIGUNDA FEDARWISCH, APPELLANT,

vs.

THADDEUS ALSOP, APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

In the judgment of counsel it is necessary to set forth a full statement of facts in this case in behalf of the appellee.

The appellant, Kunigunda Fedarwisch, complainant below, is the mother-in-law of Alsop, the appellee. A suit for damages, growing out of an assault and battery committed by complainant and others acting under her direction, upon her son-in-law, was instituted in 1896 by appellee against appellant before a justice of the peace in the District of Columbia. A judgment was rendered in favor of Alsop (appellee here) and Kunigunda Fedarwisch appealed to the Supreme Court of the District, and on April 9, 1897, judgment was rendered in favor of the appellee, Thaddeus Alsop, against appellant, Kunigunda Fedarwisch, for the sum of $150 as damages in law cause No. 40,238 (Rec., p. 1.). This judgment still remains in full force and effect, no part thereof, except the sum of $75 and the docket fee amounting to $20, paid by order of court to the attorneys

for Alsop, judgment creditor, who had a lien thereon for fees, has ever been satisfied (Rec., pp. 4–5).

Law Cause No. 40,895.

On March 31, 1897, which was two days after the entry of the verdict in Law case No. 40,238 (assault and battery case), and before a motion for a new trial could be disposed of, then pending, the said judgment debtor (appellant here), instituted a suit at law known as law cause No. 40,895, against said judgment creditor (appellee here), for the sum $366.57; that in the first count plaintiff claimed that defendant was indebted to her in the sum of $155 for house rent from April 3, 1895, to July 20, 1896; that in the second count plaintiff claimed the sum of $211.57, and the third count consisted of the money counts combined (Rec., p. 10).

The defendant (appellee here) *was regularly served with process, and on April 19, 1897, filed twelve pleas to said declaration, pleading the general issue, and the statute of limitations to the second count.*

On April 27, 1897, plaintiff joined issue on the plea of the general issue and replied new promises, and on May 1, 1897, defendant joined issue on plaintiff's replication (Rec., p. 10).

On May 4, 1897, said cause was regularly calendared for trial, but that on December 21, 1898, the said law cause was "stetted" under the rules of court (Rec., p. 10).

On February 3, 1900, the following order was passed in said law cause:

> "This cause having remained upon the stet calendar for more than three terms, upon motion of Douglass & Douglass, the same is ordered dismissed. Therefore, it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day and recover against the plaintiffs his costs of defense, to be taxed by the clerk, and have execution thereof" (Rec., p. 10).

The docket of said court, with reference to said cause, contains the entry, on February 3, 1900, "suit dismissed at plaintiff's costs, under stet rule" (M. 40, p. 235) (Rec., p. 10).

Equity Suit, No. 18,210.

On April 9, 1897, as hereinbefore stated, judgment was entered in favor of appellee Alsop against appellant Fedarwisch for $150 in Law cause No. 40,238 (assault and battery suit) (Rec., p. 1). On the same day the present equity suit was instituted by the appellant against appellee.

The bill of complaint alleges the recovery of a judgment for $150 by defendant (appellee) against complainant (appellant); that complainant is solvent; the defendant is insolvent; and that defendant is indebted unto complainant in the sum of $366.57 and that complainant—

> "*instituted a suit against said defendant [Thaddeus Alsop] in this court on March 31, 1897, in law cause No. 40,895, which suit is still pending. The record and proceedings in said law cause are also hereby referred to and made part of this bill of complaint*" (Rec., pp. 1–2).

The bill prays that—

> "complainant's said claim against the defendant may be decreed to be a set-off or counterclaim against the defendant's said judgment" (Rec., p. 3).

And "that the defendant may be enjoined from executing his said judgment" (Rec., p. 3).

The record and proceedings in Law cause No. 40,238 "are hereby referred to and made part of this bill of complaint" (Rec., p. 2).

On the same day the bill was filed, to wit, April 9, 1897, a restraining order was passed—

> "enjoining the defendant from enforcing his judgment against complainant herein, he recovered on

> April 9, 1897, in this court in law cause No. 40,238 until the further order of the court" (Rec., p. 4).

On April 20, 1897, defendant (appellee) answered the bill on merits (Rec. p. 4).

An intervening petition was filed in said cause by Obear & Douglass, claiming a prior lien of the sum of $75 of the judgment in Law cause No. 40,238 and the docket fee of $20, and on June 16, 1897, an order was passed modifying the restraining order theretofore passed in said cause directing the complainant to pay to said intervenors in their individual capacity the amount they claimed (Rec., p. 5).

Stipulation.

The stipulation entered into between counsel for the respective parties appears in the transcript and speaks for itself (Rec., p. 6).

It is agreed that the defendant (appellee) shall be allowed to withdraw his answer theretofore filed in said cause and interpose in lieu thereof a general demurrer to the bill, and—

> "that the demurrer to be interposed by the defendant as aforesaid shall be heard and determined by the court upon the bill of complaint herein, and the admission by the complainant that the Law cause No. 40,895 therein referred to was dismissed on February 3, 1900, by the clerk of the Supreme Court of the District of Columbia, under the stet rules of said court, for want of prosecution, it being hereby stipulated that the proceedings in said cause may be considered by the court at the hearing of said demurrer."

The stipulation further provides that final decree shall be entered on demurrer (Rec., p. 6).

On November 2, 1900, in accordance with the terms of said stipulation, a general demurrer to the bill of complaint

was interposed (Rec., pp. 6–7), and the questions thus presented were heard by his Honor Justice Hagner, who after mature deliberation, sustained said demurrer, and signed a decree dismissing the bill with costs (Rec., pp. 7–8). From this decree appellant has appealed to this court.

ARGUMENT.

The bill of complaint was filed April 9, 1897, and on the same date a restraining order was passed enjoining the defendant (appellee here) from enforcing his judgment in law cause No. 40,238 (assault and battery case).

The sixth paragraph of the bill contains the following allegation:

> "That before said suit was instituted and at the time of the rendition of the said judgment against your complainant, the defendant was and still is indebted unto your complainant for house rent, money loaned to him, merchandise furnished to him, and money paid for him by your complainant, in the full sum of three hundred and sixty-six and $\frac{57}{100}$ dollars ($366.57), for which amount, with interest, your complainant, with her husband, Lewis Fedarwisch, as a nominal party plaintiff with her, instituted a suit against the defendant in this court on March 31, A. D. 1897, in law cause No. 40,895, *which suit is still pending.* The record and proceedings in this law cause are also hereby referred to and made part of this bill of complaint."

An answer on the merits was filed April 20, 1897. Replication was filed June 4, 1897.

No further action was taken until October 31, 1900, when the stipulation was entered into between counsel.

It provides that the defendant (appellee here) shall have the right to withdraw his answer and interpose a general demurrer, and—

> " that the demurrer to be interposed by the defendant as aforesaid shall be heard and determined by the court upon the *bill of complaint herein, and the admission by the complainant that the law clause No. 40,895 therein referred to was dismissed on February 3d, 1900, by the Clerk of the Supreme Court of the District of Columbia, under the stet rules of said court, for want of prosecution, it being hereby stipulated that the proceedings in said cause may be considered by the court at the hearing of said demurrer.*"

The said stipulation further provides that final decree shall be entered upon demurrer.

The court below heard the cause upon the bill, demurrer and stipulation.

It will be readily observed that at the date of the hearing the conditions were entirely different from those existing at the time of the filing of the bill. The bill was filed April 9, 1897. The restraining order was passed on the same date. The stipulation was entered into October 31, 1900. The demurrer was filed November, 1900. The hearing occurred in December, 1900.

The record discloses that when the bill was filed on April 9, 1897, appellee had a judgment against appellant (law cause 40,238); appellant (complainant) had previously instituted law cause No. 40,895 to recover an alleged indebtedness, which "*suit was then pending*," and in her bill she alleged the pendency of said law suit.

After the injunction was granted which enjoined appellee "until the further order of the court," the parties directed their attention to the law cause No. 40,895.

On April 19, 1897, the appellee (defendant) filed twelve pleas, pleading the general issue and the statute of limitations. On April 27, 1897, appellant (plaintiff) joined issue on the plea of the general issue, and replied, new promise within three years prior to the institution of action, to the defendant's plea of the statute of limitations, and on May 1,

1897, defendant joined issue on plaintiff's replication (Rec., p. 10). On May 4, 1897, said cause was regularly calendared for trial (Id.).

The appellee (defendant) was at all times ready, anxious and willing to submit the question of the alleged indebtedness to a jury, but the appellant refused to follow up her suit.

Rule 39 of the Rules of Court of the Supreme Court of the District of Columbia provides for what is known as a "*Stet* Calendar." The rule, taken verbatim from the Rule Book of said court, is as follows:

"STET CALENDAR."

"Rule 39. In all cases on the civil trial calendar not otherwise disposed of by the end of the third term after issue joined (unless they stand under leave to amend, or to make new parties) there shall be entered a *stet*, unless otherwise specially ordered, and they shall not be brought forward to succeeding terms except as hereinafter directed; and in all cases on said calendar where leave to amend, or to make new parties, has been obtained, and no amendment is made, or new parties brought in by the end of the second term after that at which such leave may be obtained or where amendment is made, or new parties brought in, and the case is not otherwise disposed of by the end of the third term after such amendment of new parties made, a *stet* shall be entered, unless otherwise directed by the court; and no case in which a *stet* is entered shall be brought forward on the calendar of the succeeding term, except as hereinafter directed.

"Sec. 2. If either party shall desire to try any case in which a *stet* has been entered it shall be his duty to give the adverse party, or his attorney, at least fifteen days' notice, exclusive of Sundays, in writing, of his intention to press for trial before the commencement of the term next succeeding such notice given, and upon filing such notice, duly served, on or before the first day of the term, the party shall have the same right to insist upon trial as if the case were

regularly on the calendar for that term, the court having the right to designate the order and time of calling such case, having reference to the other business of the term.

"Sec. 3. All cases in which a *stet* may be entered shall be transferred by the clerk to a separate calendar, to be called a *stet* calendar, and after the expiration of the third term after *stet* entered, it shall be the duty of the clerk, without direction from the court, to make an entry dismissing the case at the cost of the plaintiff. But cases on said *stet* calendar that have been enjoined, or which stand under rule reference, or to abide the decision in other cases, shall be considered as continued until a special order to the contrary; and this rule shall apply to all cases on the said trial calendar where *stet* may be entered by consent."

The practice prevailing, under the foregoing rule, has been that when a law cause is called for trial and the plaintiff fails to respond, the suit is dropped from the assignment and ordered to be taken off the trial calendar, and placed on the "*stet*" calendar.

On December 21, 1898, the said law cause 40,895, was called for trial. The plaintiff did not respond. The court ordered the same to be transferred to the "*stet*" calendar. The plaintiff (appellant here) had from the said last mentioned date until January 1900—three full terms of the court—to move the court to order the said suit to be placed on the *trial* calendar. But plaintiff (appellant) *took no action whatever*, and on February 3, 1900, the court passed the following order:

"JANUARY TERM, 1900.

"February 3.

"This cause having remained on the stet calendar for more than three terms, upon motion of Douglass & Douglass, the same is ordered dismissed. Therefore, it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day and recover against the plaintiffs his costs of de

fense, to be taxed by the clerk, and have execution thereof."

The clerk of the court made the following entry in said law cause, on February 3, 1900:

"Suit dismissed at plaintiffs' costs under 'stet' rule" (M. 40, p. 235.)

When the cause came on for hearing, complainant, by her own fault and laches, was confronted with this state of facts: A lawsuit had been instituted covering the very cause of action set out in the bill which had been dismissed for want of prosecution on her part. This was admitted by the stipulation. The suit at law could not then be re-instituted. It was, upon its face, barred by the statute of limitations. What else could the court below do but dismiss the bill?

It is submitted, the complainant having alleged in her bill that, prior to the filing of said complaint, a suit at law had been commenced, "*which suit is still pending*," that this was the inducing cause which prompted the court to grant the restraining order enjoining the defendant (appellee) from enforcing the collection of his judgment in law cause 40,238 (assault and battery case) "until the further order of the court."

The restraining order was passed for the purpose of enjoining defendant from proceeding by execution in law cause No. 40,238, *and to await the determination of law cause No. 40,895.*

We submit that the case of Droop *vs.* Ridenour, 9 Appeal Cases D. C. 95, is absolutely decisive of this case.

It was held in that case that:

> "A bill in equity is maintainable by a creditor whose claim has not been reduced to judgment, against a debtor who has absconded from the jurisdiction for the purpose of evading his creditors, to subject an equitable interest of the debtor to the payment of the debt, where the debtor has no property

in the jurisdiction out of which the debt can be satisfied by proceedings at law."

"If in such a case, there is a pending suit at law by the creditor against the debtor in which no service of process has been had because of the absence of the debtor from the jurisdiction, and the debtor will enter an appearance in such suit, he will be entitled to a stay of the proceedings in equity to await the result or the action at law."

In this case an action at law had been commenced prior to the filing of the bill in equity, "*which suit was still pending*" at the time of the institution of the equity cause (exactly the condition of the case at bar) and in the course of the opinion of Droop *vs.* Ridenour, supra, at page 108, the court says:

"It is by the conduct of the defendant himself that he may elect to forgo the right to trial by jury; *for he may enjoy the right of* such trial, if he thinks proper to appear to the pending action at law, and submit to the trial of that case. Upon entering his appearance to that action he will be entitled to a stay of this proceeding to await the result of the action at law, and if that action be determined against the plaintiffs therein it will end the present proceeding. But if no such appearance be entered by the defendant, the complainants will be entitled to proceed in this suit."

In the Droop *vs.* Ridenour Case, the defendant was a non-resident; an action at law was instituted; a non-est return was made by the marshal; complainant then commenced proceedings in equity and alleged that the defendant was concealing himself, and service of process could not be obtained. Fraud was alleged in the bill.

Even in this extreme case, this court said:

"Upon entering his [defendant] appearance to that action [law] he will be entitled to a stay of this [equity] proceeding to await the result of the action at law, and if that action be determined against the plaintiffs herein, it will end the present proceedings."

How much stronger is the appellee's position in this case!

He was regularly served with process. The equity suit was instituted. An injunction was obtained which prevented the appellee from enforcing his judgment in law cause 40,238. Nothing was done in the equity cause. The result of law cause 40,895 was awaited. In this suit, appellee filed twelve pleas, pleading the general issue and limitations.

With reference to law cause 40,895 "*that action was determined against the plaintiff herein.*" In the language of this court, "does that not end the present proceeding."

In the course of the opinion of the Court of Appeals in the same case (Droop v. Ridenour) it is said:

> "And in New York, in the case of Bank *vs.* Wetmore, 124 N. Y. 24, the question was fully discussed, and the court, in the conclusion of its opinion upon the subject, says: 'But where a party has done all that is possible for him to do to prepare the way for his case to equitable cognizance, he is not to be denied access to the only tribunal, capable of granting relief, merely because he had proceeded no further than he was, *without any fault or laches on his part, permitted to go.* That would be repugnant to the maxim there is no wrong without a remedy.'"

It is to be noted in this case the complainant does not allege fraud or that defendant is a non-resident, or that service can not be obtained upon him, or that there is any fund within the control of a court of equity, concerning which complainant has a lien upon or interest in.

> "Judgment is necessary to establish the measure of the demand of the complainant for which he seeks satisfaction in chancery."
>
> Swayne, J., in Smith *vs.* Railroad, 95 U. S. 398.

"One reason for the rule is that the investigation may prove fruitless, as it may turn out that no debt is due."

Green, Ch. J., in Oakley *vs.* Pound, 14 N. Y. Eq. 178.

"The complainant must do all he can at law to obtain his rights; if he is then still without remedy, a court of equity will then entertain his bill."

Case *vs.* Beauregard, 101 U. S. 68.

Hatch *vs.* Dana, 101 U. S. 205.

"The mere fact that the debtor is insolvent or in failing circumstances is not sufficient."

Lawson *vs.* Grubbs, 44 Ga. 466.

Hall *vs.* Joiner, 1 S. C. 186.

Monroe *vs.* Cutter, 9 Dana (Ky.) 93.

"It appears that he (complainant) has obtained judgment against the representatives of both estates of both estates of A. J. and R. R. Lawson, and he can levy his fi. fa. upon either, and by the process of the court. . . . He alleges that the said executors have given no bond and are 'in failing and in insolvent circumstances.' 'And he further avers that the estates of Alexandria and Robert Lawson to be hopelessly insolvent.'" Bill dismissed.

44 Ga. 466 (supra).

"A simple contract creditor can not maintain a bill in equity against his debtor and the grantee, to set aside a fraudulent conveyance of the debtor's property even *though the debtor be insolvent, and* without the aid of an injunction, the debt may be lost. He must first proceed at law, and exhaust his remedy there."

Hall *vs.* Joiner, 1 S. C. 186 (supra).

"A charge in a bill that a defendant who is sued at law has secretly removed his goods from his store,

> and will, as complainant believes, remove them from the country or sell them, and secrete the proceeds so as to prevent the judgment from being satisfied when obtained, can not have the effect of translating the case from the common law tribunal in which it was commenced to a court of equity. The most that the chancellor can do upon such a bill is to aid the common law tribunal—as by preventing those acts by which efficacy of the judgment is threatened, or securing the complainant against them. . . . To sustain a bill to subject the debtor's effects to the payment of a debt, it must appear that he is a non-resident, or that an execution against his estate has been returned 'nulla bona'; one of these allegations, it seems, must be made to give the court jurisdiction, or at least, to justify a *final decree*."
>
> Monroe *vs.* Cutter, 9 Dana (Ky), 93 (supra).

Due regard being had to the condition of the record, can it not be said that the appellee was and is entitled to a trial by jury as guaranteed by the Seventh Amendment to the Constitution?

> Cates *vs.* Allen, 149 U. S. 451.
> Scott *vs.* Neeley, 140 U. S. 106.

This right is not always satisfied by issues sent out of chancery.

> Whitehead *vs.* Shattuck, 138 U. S. 146.
> Buzard *vs.* Houston, 119 U. S. 347.
> Hess *vs.* Horton, 2 App. Cas. D. C. 81.

It is respectfully submitted that the judgment of the court below should be affirmed.

CHAS. A. DOUGLASS,
E. S. DOUGLASS,
LEVI H. DAVID,
Attorneys for Appellee.